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NO. 44887-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEFFAN GALE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Timothy Andrews pursued and punched Steffan Gale inside a grocery store because he wanted Mr. Gale's help tracking down someone who had stolen from him. Mr. Andrews was an admitted gang member and drug dealer. When Mr. Andrews assaulted Mr. Gale, Mr. Gale struck back, swinging at him with a knife that he had in his hand. Mr. Andrews suffered two serious knife wounds and Mr. Gale was charged with first degree assault while armed with a deadly weapon.

The court instructed the jury to consider the lesser offenses of second and third degree assault over Mr. Gale's objection. The prosecution never explained and the court never found that the evidence affirmatively showed Mr. Gale could be convicted of third degree assault and acquitted of first and second degree assault, even though this showing is required to receive a lesser offense instruction.

The court instructed the jury on the law of self-defense but refused Mr. Gale's proposed instruction that a person has the right to act on circumstances as they appeared to him even if his perception is mistaken. The prosecution told the jury that a person is never allowed to use a knife against an unarmed person. Because the court had not provided the self-defense instruction Mr. Gale requested, the jury was

not informed that the State's argument was wrong. As discussed below, these errors denied Mr. Gale a fundamentally fair jury trial.

B. ASSIGNMENTS OF ERROR.

1. The court improperly granted the prosecution's request to instruct the jury on the uncharged inferior degree offense of third degree assault contrary to the principle that the evidence must affirmatively show the defendant committed only the lesser offense

2. The court failed to make the law of self-defense manifestly apparent by refusing to instruct the jury on a person's right to act on appearances, even if mistaken, when acting in self-defense.

3. The court's refusal to provide the act on appearances instruction denied Mr. Gale his right to present a defense.

4. The prosecution misrepresented the law of self-defense in its closing argument.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A court may not instruct the jury on an uncharged inferior degree offense unless the evidence affirmatively shows that only the inferior offense was committed and not the greater offense. The affirmative showing may not rest on the notion that the jury could disbelieve the State's witnesses. The prosecution asked the court to

instruct the jury on the inferior degree offense of third degree assault but never explained what evidence affirmatively showed Mr. Gale could be convicted of this offense and acquitted of the greater crimes of first or second degree assault. Did the court lack authority to instruct the jury on the uncharged inferior offense of third degree assault?

2. The court's instructions must make the law of self-defense patently clear in a self-defense case. Here, the court refused to give a requested instruction that a person may lawfully defend himself based on the threat he perceives, even if he is mistaken. The prosecution told the jury that self-defense is never allowed when a person uses a knife against an unarmed person, and the court overruled defense counsel's objection, even though this misrepresented the law of self-defense. Did the court's refusal to unambiguously instruct the jury on the law of self-defense combined with the prosecution's claim that actual danger from a weapon is required to use a knife in lawful self-defense misrepresent the law to the jury?

D. STATEMENT OF THE CASE.

Timothy Andrews was a long-time drug dealer and gang member who, after being arrested for unlawful possession of a firearm and facing up to 212 months in prison, entered into a formal contract to

arrange drug sales for the police. RP 110-12, 195.[1] Although his contract with the police and prosecution required him to obey the law unless taking part in a police-approved drug transaction, the police let him "bend and break rules" and he remained involved in using and selling drugs. RP 112.

On May 16, 2011, a long-time acquaintance Steffan Gale called Mr. Andrews, asking if he knew where he could find methamphetamine. RP 114, 118, 235. Mr. Andrews said no. RP 118. Later that day, Mr. Andrews agreed to lend money to a person he knew as Louisiana, also known as Mack. RP 121, 470-71. When Mr. Andrews pulled out a wad of bills to give $50 to Mack, Mack grabbed all of the money as well as Mr. Andrews's keys. RP 124-25.

Mr. Andrews claimed to be most upset about losing his keys, not the approximately he said $1800 Mack stole (although this may be because Mack actually stole only $80, which is what Mr. Andrews told the police). RP 243, 434. Mr. Andrews did not know where to find Mack to get his keys back, but he thought Mr. Gale knew where Mack

[1] The trial transcripts consist of several consecutively paginated volumes of proceedings referred to herein as "RP" followed by the page number. The sentencing transcript was separately prepared and is referred to by the date of proceeding (May 17, 2013).

lived. RP 127, 131. He called Mr. Gale and told him he would sell him some methamphetamine. RP 478. They arranged to meet at the Safeway because Mr. Gale needed some groceries. RP 128, 478.

In the Safeway parking lot, Mr. Andrews admitted he had no drugs to sell to Mr. Gale, but that Mack had stolen his keys and he wanted Mr. Gale to take him to Mack's house. RP 130-31, 483. Mr. Gale refused. RP 133, 483. Mr. Gale went into the store to get his groceries. RP 133, 486. He thought Mr. Andrews was under the influence of drugs; Mr. Andrews admitted he used PCP before meeting Mr. Gale to get his courage up. RP 128-29; 485-86.

While Mr. Gale stood by the milk aisle, he heard Mr. Andrews behind him, telling someone on the telephone that he was going to do something to Mr. Gale if Mr. Gale did not help him. RP 486-87. Mr. Gale turned and said, "you're not going to do shit." RP 487.

According to Mr. Gale, Mr. Andrews punched him in the face. RP 489. Mr. Gale believed Mr. Andrews was a boxer and thought he would be injured. RP 489-90, 493. Mr. Gale tried to get Mr. Andrews off of him and fought back. RP 491. However, Mr. Gale had a knife in his hand from a small multi-tool that he carried with him and he was holding this knife when Mr. Andrews approached him. RP 491-92.

With this knife in his hand during the scuffle, Mr. Gale swung and cut Mr. Andrews on the right bicep, piercing the muscle, and also stabbed him in his left side, hitting his spleen. RP 501. The bicep wound was ten centimeters long and four or five centimeters deep, while the spleen wound was deeper. RP 306, 309, 322.

Mr. Andrews depicted the incident differently. He claimed that he walked into the grocery store alongside Mr. Gale and Mr. Gale started swinging his hands at him. RP 135-36. Mr. Gale immediately put his knife into Mr. Andrews's arm and sliced his bicep. RP 137-38. Mr. Gale ran away but came back and stabbed Mr. Andrews again in the side. RP 139-40.

Mr. Andrews went toward the front of the grocery store and screamed for someone to call 911. RP 280. He directed a store clerk to rip his shirt and "tie off" his wound like a tourniquet. RP 282. Rather than wait for aid to arrive, Mr. Andrews drove himself to the hospital. RP 153, 285. He refused to tell the police what happened or who did it for over one week. RP 246, 409-10, 579-80.

The prosecution charged Mr. Gale with one count of first degree assault while armed with a deadly weapon. CP 1. Over Mr. Gale's objection, the court also instructed the jury on the lesser degree offenses

of second and third degree assault. RP 549-51, 589-91; CP 79, 83. The jury acquitted Mr. Gale of both first and second degree assault but convicted him of third degree assault. CP 93-95.

The court refused the prosecution's request that Mr. Gale receive a prison-based drug treatment sentence and imposed the maximum standard range term of 57 months. 5/17/13RP 13-15, 17. Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **The prosecution is not entitled to a jury instruction on an uncharged inferior degree offense when there is no affirmative evidence showing that only the lesser was committed**

a. *The State may obtain an instruction on a lesser degree offense only when the evidence would support a conviction on the lesser offense alone.*

In order for a party to obtain an instruction on an uncharged lesser or inferior degree offense, the moving party must meet two conditions: (1) legally the lesser offense is a necessary element of the offense charged, and (2) factually the evidence supports an inference that only the lesser crime was committed. *State v. Workman,* 90 Wn.2d

443, 447-48, 584 P.2d 382 (1978); RCW 10.61.003; U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22.

This factual test "[n]ecessarily" requires a "more particularized" showing "than that required for other jury instructions." *State v. Fernandez-Medina,* 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). "[T]he evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *Id.*

The court views the evidence in the light most favorable to the party requesting the instruction to determine whether the trial evidence was sufficient for the court to give a lesser or inferior degree offense instruction. *Id.* at 455-56. This evidence must "permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" *Id.* at 456 (quoting *State v. Warden,* 133 Wn.2d 559, 563, 947 P.2d 708 (1997) and citing *Beck v. Alabama,* 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

"Our case law is clear, however, that the evidence must affirmatively establish the [proponent]'s theory of the case - it is not enough that the jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina,* 141 Wn.2d at 456. The court "may not" give an

inferior degree instruction when the factual basis for the instruction is merely that the jury disbelieves both the prosecution's witnesses as well as the defense witnesses. *State v. Wright*, 152 Wn.App. 64, 71-72, 214 P.3d 968 (2009).

The prosecution charged Mr. Gale with first degree assault, claiming he assaulted Mr. Andrews by a deadly weapon or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011. After the prosecution rested its case, it sought additional instructions on second and third degree assault over Mr. Gale's objection. RP 551, 589. The court granted the request with little analysis and the jury found Mr. Gale not guilty of either first or second degree assault, but convicted him of third degree assault. RP 591, 712.

b. *There was no reasonable view of the evidence showing Gale was not guilty of the greater offenses but instead guilty of only the lesser.*

In *State v. Jackson*, 70 Wn.2d 498, 499, 424 P.2d 313 (1967), a case bearing similarities to Mr. Gale's, a store owner confronted the defendant on the street after he saw the defendant steal a suit coat. The store owner testified that the defendant pulled his hand out of his pocket with an open knife and "kept stabbing at me," hitting him in the nose and mouth before the store owner realized he had been cut. *Id.* at 500.

The defendant claimed he was holding a pen knife because he had a sliver in his nail and did not expect anyone to approach him. *Id.* He said that the store owner "started pounding on me, and I held up my hand to hold him off," cutting his own hand in the process and denying any knowledge of using his knife against the complainant's face. *Id.* at 500-01.

Mr. Jackson was charged with assault in the second degree, defined as an intentional assault by use of a deadly weapon or the infliction of grievous bodily harm.[2] On appeal, he argued that the court should have instructed the jury on the lesser offense of third degree assault.[3]

The Supreme Court held that the trial judge correctly denied the inferior degree instruction request based on the principle that the facts

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[2] Second degree assault was then defined, in pertinent part, as occurring when:

> under circumstances not amounting to assault in the first degree[, a person]
> (3) Shall wilfully inflict grievous bodily harm upon another with or without a weapon; or
> (4) Shall wilfully assault another with a weapon or other instrument or thing likely to produce bodily harm . . . .

Former RCW 9.11.020(3), (4).

must provide a basis for convicting a person of only the lesser crime. *Id.* at 503. In Mr. Jackson's case, "the evidence showed that at all times during the affray and pursuit, defendant carried the knife in his hand" and repeatedly injured the store owner's face. *Id.* Because the defendant knew he held the knife and must have purposefully inflicted injuries with the knife, there was no evidence for the court to "authorize the jury to find third-degree assault as a lesser included offense." *Id.*

Likewise, in *State v. Walther*, 114 Wn.App. 189, 193, 56 P.3d 1001 (2002), the defendant was charged with second degree assault and he sought a lesser included offense instruction for third degree assault. The incident occurred when Mr. Walther's friend borrowed his car but failed to return it. *Id.* at 190. Mr. Walther tracked down the car and saw his friend in the driver's seat. *Id.* The friend began driving back and forth and Mr. Walther fired three gunshots in the car's direction to stop the car. *Id.* at 191. He did not aim at the driver, instead trying to hit the edges of the windshield, but bullet fragments injured the driver. *Id.* Mr. Walther claimed he did not intend to shoot the driver, just the car; he

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[3] Third degree assault was then defined as "an assault or an assault and battery not amounting to assault in either the first or second degrees." Former RCW 9.11.030; *see State v. Stationak*, 73 Wn.2d 647, 651, 440 P.2d 457 (1968). Although the definition of third degree assault was different than the current

was negligent in how he fired his shots; and he should have received a third degree assault instruction. *Id.* The Court of Appeals held that Mr. Walther had used a deadly weapon against the driver, even if his purpose was to recover his car. *Id.* at 192. Consequently, he "was not entitled" to a third degree assault instruction because "[a]ny assault with a deadly weapon is at least a second degree assault." *Id.*

Third degree assault "specifically requires that the evidence not rise to the level of first or second degree assault." *State v. Daniels*, 56 Wn.App. 646, 651, 784 P.2d 579 (1990); RCW 9A.36.031. In Mr. Gale's case, the first degree assault allegation required the of use of a deadly weapon with the intent to cause great bodily harm; and the second degree assault instruction permitted a guilty verdict if the jury found either Mr. Gale intentionally assaulted Mr. Andrews and recklessly inflicted substantial bodily harm or he assaulted Mr. Andrews with a deadly weapon. CP 74, 79 (Instructions 12, 17). For third degree assault, the prosecution had to prove Mr. Gale "caused bodily harm" by a weapon or instrument "likely to produce bodily harm" and acted with criminal negligence. CP 83 (Instruction 21).

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definition, the principles governing when a person is entitled to an instruction on an inferior degree were the same. *See, e.g., Stationak*, 73 Wn.2d at 650.

A third degree assault instruction is unavailable without affirmative evidence proving that only this offense was committed. *Fernandez-Medina*, 141 Wn.2d at 456. When neither the State's evidence, if believed, nor the defense evidence, if believed, prove only a criminally negligent assault occurred, third degree assault by criminal negligence is not authorized. *See Wright*, 152 Wn.App. at 71-72.

Mr. Gale used a sharp knife and there was no dispute at trial that this knife was a deadly weapon, defined as any instrument which, under the circumstances it is used, is readily capable of causing death or substantial bodily harm. CP 73; RCW 9A.04.110(6). The knife in Mr. Gale's hand, as used, was readily capable of causing substantial bodily harm. RP 298, 304-05, 307-09.

There was also no dispute that Mr. Andrews suffered serious injuries when Mr. Gale cut him with a knife on his bicep and spleen. The two separate wound penetrated deeply and caused substantial blood loss. The wound on Mr. Andrews's right bicep was 10 centimeters long and four to five centimeters deep. RP 306, 309. The doctor described it as a "fairly large wound." RP 300. The stab wound to Mr. Andrews's left abdomen penetrated more deeply than the bicep injury. RP 300,

322. The wounds were life-threatening if not immediately treated. RP 298.

If Mr. Andrews's testimony is believed, Mr. Gale intentionally stabbed him once, walked away, came back and stabbed him a second time even though he was already seriously injured and bleeding from his bicep. RP 137-40. If Mr. Gale's testimony is believed, he struggled with Mr. Andrews after Mr. Andrews punched him in the face. He knew he held a knife in his hand but was reacting to Mr. Andrews and trying to defend himself. RP 489-90, 493. He did not pursue Mr. Andrews twice, and instead he left once he saw that Mr. Andrews was injured. RP 494-95.

Mr. Gale told the police and the jury that he acted in self-defense. RP 423. His nickname was "Tiny," and he carried a knife because he was skinny. RP 490. He knew Mr. Andrews was a boxer and had been using drugs. RP 485, 490. He heard Mr. Andrews threaten him and then punch him and feared he could be injured. RP 488.

Criminal negligence requires evidence that the perpetrator failed to be aware of a substantial risk that a wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation. CP 82; RCW

9A.08.010(1)(d). For Mr. Gale to be criminally negligent, there would have to be evidence that he was unaware he held a knife when he told Mr. Andrews he would not "do shit" to him, fought him, and twice stabbed him in different parts of his body, deeply penetrating his spleen and bicep. RP 487, 491. But Mr. Gale was aware that he held a knife in his hand throughout the incident and said "I just stabbed him" even if the incident was so quick that he did not recall how he did it. RP 491. Although Mr. Gale was not intending to seriously injure Mr. Andrews, he knew he stabbed Mr. Andrews. RP 491. The nature of the two stab wounds and Mr. Gale's admission that he knew he stabbed Mr. Andrews preclude the court from concluding that the evidence affirmatively showed Mr. Gale was not guilty of first or second degree assault and only guilty of third degree criminal negligence. The court was not authorized to permit a conviction for this uncharged inferior degree offense without the required affirmative showing.

c. *The court misapplied the law when considering the State's request for a lesser offense instruction.*

In order for the court to give an inferior degree instruction, the evidence must do more than merely cast doubt on the prosecution's theory regarding the charged offense; instead, the evidence must

affirmatively establish the prosecution's theory regarding the lesser offense. *State v. Fowler,* 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair,* 117 Wn.2d 479, 816 P.2d 718 (1991); F*ernandez–Medina,* 141 Wn.2d at 455-56.

The prosecution sought the inferior degree instructions but did not offer any theory under which Mr. Gale could be acquitted of the greater offenses but found guilty only of third degree assault. RP 550-52. The prosecutor merely said he wanted those instructions after Mr. Gale withdrew them from the instructions he proposed at the start of the case. RP 549-551.

At the time the State made its request, the court did not rule on whether the inferior degree offenses should be included. RP 551. But it included those instructions in its final packet for the jury. RP 586, 589. Defense counsel objected. RP 589. He argued there was no evidence that Mr. Gale had been reckless or acting with criminal negligence. RP 590. The court summarily stated that based on Mr. Gale's testimony, the jury "could conclude" he acted with criminal negligence. RP 590-91. The court did not mention or acknowledge the requirement that the prosecution was required to affirmatively show that the evidence would show that Mr. Gale was guilty of only the lesser offense. *Id.* The

prosecution declined to even comment on how it made the necessary showing. *Id.*

In its closing argument, the prosecution said almost nothing about the lesser offenses. The argument-in-chief contained no mention of the factual basis for second or third degree assault and in the rebuttal argument, the prosecution merely stated, "real quick," the lesser included offenses are "tools available to you." RP 686. The State "believes" Mr. Gale also committed second degree and third degree assault. RP 686-87. The prosecution did not explain how Mr. Gale's acts could have been criminally negligent, or even reckless. The State never articulated a theory of the case that would let the jury find Mr. Gale guilty of only the lesser offense of third degree assault.

The prosecution never presented a factual basis to convict Mr. Gale solely of the lesser third degree assault, and not the greater offenses of first or second degree assault. The court overlooked this requirement and improperly offered the jury the compromise verdict of third degree assault over defense objection.

d. *The remedy is reversal of the conviction.*

It is only when the jury has been "properly instructed" on a lesser included offense that a conviction on a lesser offense may stand.

In re Heidari, 159 Wn.App. 601, 607, 248 P.3d 550 (2011), *aff'd*, 174 Wn.2d 288, 274 P.3d 366 (2012). Because the State did not present evidence supporting an inferior offense instruction, the court lacked authority to instruct the jury on this lesser offense and the conviction must be reversed and vacated.

The jury acquitted Mr. Gale of the charged offense of first degree assault as well as the inferior offender of second degree assault. "Acquittal of an offense terminates jeopardy and prohibits the State from trying the defendant a second time for the same offense." *State v. Linton*, 156 Wn.2d 777, 784, 132 P.3d 127, 131 (2006); U.S. Const. amend. 5; Const. art. I, § 9. Just as Mr. Gale cannot be retried for first degree assault following the jury's acquittal, he may not be retried for the uncharged lesser offense of third degree assault when there was insufficient evidence to support the court's instruction on the lesser offense. *Linton*, 156 Wn.2d at 784; RCW 10.43.050.

2. **The court failed to accurately and completely instruct the jury on the elements of self-defense, over Mr. Gale's objection**

a. *The right to act in self-defense is constitutionally guaranteed.*

The right to present a defense includes the right to have the jury instructed on the accused person's theory of defense, provided the instruction is supported by the evidence and accurately states the law. U.S. Const. amends. 5, 14; *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. *State v. Agers*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

> Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.

State v. Koch, 157 Wn.App. 20, 33, 237 P.3d 287 (2010).

Additionally, it is constitutionally mandated that, "The right of the individual citizen to bear arms in defense of himself, or the state,

shall not be impaired." Art. I, § 24.[4] This "quite explicit language about the 'right of the individual citizen to bear arms in defense of himself'" set forth in article I, section 24 "means what it says." *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 99 (2010).

The federal constitution likewise guarantees the right to act in self-defense; "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." *McDonald v. City of Chicago, Ill.*, 561 U.S. __, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010); U.S. Const. amends. 2, 14. The right to bear arms in self-defense is "deeply rooted" and "fundamental" to our concept of liberty. *McDonald*, 130 S. Ct. at 3036-37; *Sieyes*, 168 Wn.2d at 292.

b. *The right to act in self-defense includes the right to act on the fear of bodily harm even if the fear is mistaken.*

The jury instructions setting forth the law of self-defense must make the legal standard manifestly apparent to the average juror. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); *see State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The jurors are not expected to parse grammar and apply rules of statutory construction

[4] Article I, section 24 states in full, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to

when evaluating a jury instruction. *LeFaber*, 128 Wn.2d at 902-03. If a self-defense instruction "permits" an incorrect understanding of the law, it is deficient. *Id.* An erroneous instruction on the law of self-defense is an error of constitutional magnitude and is presumed prejudicial. *Id.*

It is a "well-settled principle in Washington" that the jury must view self-defense from the conditions as they appeared to the defendant. *Walden*, 131 Wn.2d at 474. The prosecution bears the burden of disproving, beyond a reasonable doubt, that the defendant reasonably believed that force was necessary to defend himself against imminent bodily harm. *Id.* at 473. A defendant may reasonably fear injury even when the complainant is unarmed and the defendant has a knife. *See Id.* at 472, 475. A self-defense instruction is erroneous if it does not make it manifestly apparent to the average juror that a person is entitled to use self-defense even though he is not in actual danger so long as he reasonably, but mistakenly, believes he is in danger. *State v. Theroff,* 95 Wn.2d 385, 390, 622 P.2d 1240 (1980).

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organize, maintain or employ an armed body of men."

In order to accurately inform the jury that it must view the incident from Mr. Gale's perspective, he asked that the jury receive WPIC 17.04, which provides:

> A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 50; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.04 (3d Ed 2008).

The court refused to include this instruction, even though it agreed the instruction was correct, because it believed the instruction was not mandatory. Instead the court explained the law of self-defense as follows:

> It is a defense to a charge of assault that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, in preventing or attempting to prevent an offense against the person, and when the force used is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

> The state has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 85 (Instruction 23).[5]

In *LeFaber*, the court parsed a similar self-defense instruction to determine whether it was manifestly clear to the average juror that the jury put itself in the shoes of the defendant. 128 Wn.2d at 900. In *LeFaber*, a homicide case, the instruction directed the jury to consider whether "the defendant reasonably believe[d]" he was faced with death or great personal injury and there was imminent danger of such harm. *Id.* at 899. The instruction further stated, just as the instruction given by the court in Mr. Gale's case, that a person "may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the defendant taking into consideration all the facts and circumstances known to the defendant at the time and prior to the incident. The force employed may not be more than is necessary." *Id.*

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[5] The court also instructed the jury that a person has "no duty to retreat" and defined when force is necessary for self-defense. CP 86-87. Neither instruction explained that force may be lawful when the defendant acts on a reasonable but mistaken belief about the degree of force he faced.

The court held that this instruction could confuse the jurors, because an average lay person could believe that there was a requirement of actual imminent harm that the jury must find, which does not correctly underscore the principle that a person may act in lawful self-defense even if his belief about the extent of harm he faced is incorrect. Even though the latter part of the instruction explained that the jury looks at the facts and circumstances as they appeared to the defendant, but preceding this information, the instruction asked whether the defendant reasonable believed there was actual imminent harm.

In a case that predates *LeFaber*, the Court of Appeals found no error in a court's decision not to separately instruct the jury on the defendant's right to act on appearances because the other instructions were accurate and the defendant was able to argue to the jury that he reasonably believed he faced danger to himself, even if that belief was mistaken. *State v. Kidd*, 57 Wn.App. 95, 99, 786 P.2d 847 (1990). *Kidd* was decided without the without the benefit of *LeFaber* and its progeny, which strictly adhere to a close parsing of all jury instructions and emphasize the importance of the subjective element of lawful self-defense.

Moreover, the opinion in *Kidd* was premised on defense counsel's unrestricted ability to argue that the jury should view the case based on the defendant's perception even if he was mistaken about the degree of force he faced. *Kidd*, 57 Wn.App. at 99. Unlike *Kidd*, Mr. Gale was not able to effectively argue that he lawfully used force even if he was wrong about the amount of danger he faced.

In his closing argument, defense counsel argued that Mr. Gale had the "right to fight back" including the right to use whatever weapon he had in his hands, because he did not know what weapon Mr. Andrews had. RP 654-55. However, the prosecution told the jury that this argument misrepresented the law and the instructions did not let Mr. Gale use whatever was in his hand. RP 690-91. Defense counsel objected when the State claimed he had misrepresented the law, but the court overruled the objection and, in its ruling, told the jury that the prosecutor's argument was correct. RP 690. The prosecutor then emphasized that once they read the self-defense instruction, they would see that, "You don't get to stab an unarmed man," and the jury should not "let him get away with it." RP 691.

In *Walden*, the defendant was accused of stabbing several unarmed men. 131 Wn.2d at 472. The Supreme Court explained that

self-defense applies even to the use of "of deadly force in self-defense against an unarmed assailant." *Id.* at 474. *Walden* demonstrates that a person is entitled to act in self-defense when he has a weapon and the person he confronts is unarmed. The law of self-defense does not bar a person from using a weapon, instead, it rests on whether the degree of force was necessary and reasonable, based on how the defendant perceived the threat he faced. *Id.* at 477. Here, the prosecutor incorrectly told the jury that Mr. Gale was legally prohibited from defending himself by using a knife when the complainant was not armed, and the court refused to correct the prosecution's error.

c. *The incomplete self-defense instructions together with the court's endorsement of the prosecutor's incorrect argument undermined the subjective element of self-defense.*

By refusing to give the jury Mr. Gale's requested instruction explaining his right to act on how the situation appeared, even if his belief was mistaken, Mr. Gale was not permitted to effectively argue self-defense. The court's instructions did not plainly state the legal standard governing the circumstance when the accused person has a reasonable but mistaken belief that he faced bodily injury.

"Jury instructions on self-defense must more than adequately convey the law." *Walden*, 131 Wn.2d at 473. The court's instructions must make it manifestly apparent to the requirement that the defendant may act in self-defense even if his belief that he faces bodily harm is mistaken. *LeFaber*, 128 Wn.2d at 903. A person is entitled to act in self-defense when he reasonably apprehends that he is about to be *injured*, even if he is mistaken about the nature of the threat. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). The act on appearances instruction Mr. Gale proposed would have clearly explained this principle, and it was not unambiguously set forth in the court's remaining instructions.

The court's failure to give the act on appearances instruction was exacerbated by the State's argument and court's endorsement of that argument. The prosecution found took advantage of the ambiguity in Instruction 23 to tell the jury that no one lawfully uses force when armed and his opponent is unarmed, in any circumstance. RP 691. Because the jury had not been clearly instructed that self-defense must be measured from Mr. Gale's own perception of the nature and degree of threat he faced, even if mistaken, the prosecutor used the instruction's ambiguity to claim it is not possible to use lawful self-

defense when using a knife against an unarmed opponent. *Id.* Had the jury received WPIC 17.04, it would have been fully and accurately informed about Mr. Gale's right to act in self-defense if he was mistaken about the nature and degree of force he faced, as long as the other criteria for self-defense were met. Without WPIC 17.04, the jury was left with the impression, reinforced by the State's argument, that actual danger from a weapon is required to use force against another person.

The jury's verdict proves that it did not believe the complainant's story of the incident. Mr. Gale was acquitted of both first and second degree assault even though he caused serious injuries to Mr. Andrews. Had the jury received the instruction Mr. Gale requested, the law governing self-defense would have been manifestly apparent to the jury and they would not have been misled by the State's argument about Mr. Gale's right to use a knife against an unarmed man. Absent instructions making the law manifestly apparent, the instructions and argument "may have affected the final outcome of the case, [therefore,] the error cannot be declared harmless. *Walden*, 131 Wn.2d at 478.

F. CONCLUSION.

Mr. Gale's conviction should be reversed because the court lacked authority to permit the jury to consider the inferior degree offense of third degree assault. Alternatively, the incomplete self-defense instructions require a new trial.

DATED this 5th day of November 2013.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 44887-4-II
v.	)	
	)	
STEFFAN GALE,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, ANN JOYCE, STATE THAT ON THE 4TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
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SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF NOVEMBER, 2013.

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